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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 378.

FRED PORTER, by His Executors, et al., *Petitioners*,

v.

BARCLAY COOKE and ROBERT BARBOUR COOKE, as Executors
of the Estate of WALTER E. COOKE, Deceased, et al.,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals for the
Fifth Circuit.

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**PETITION FOR REHEARING OF ORDER DENYING
PETITION FOR WRIT OF CERTIORARI.**

To the United States Circuit Court of Appeals for the
Fifth Circuit.

Fred Porter, by his executors, et al., by their attorneys,
respectfully petition the Court to reconsider its Order of
October 19, 1942, denying their petition for writ of certiorari
in the above-entitled cause. The petition for writ of
certiorari was filed in this Court on September 5, 1942. No
opposition to the petition was filed by respondents.

PRELIMINARY STATEMENT.

This suit was brought by members of a joint enterprise engaged in oil exploration against the managing trustee of the enterprise (Emlet), one of the contributing members of the enterprise (Cooke) and a confidential employee of the enterprise (Gay). The theory of the suit was that Cooke, in confederation with Gay, coerced Emlet into transferring certain assets and leaseholds owned by the enterprise to Cooke who, utilizing such assets and leaseholds and information supplied to him by Gay, subsequently discovered oil which he sold for a large sum of money. The relief sought by petitioners was the establishment of their interests in the property acquired by Cooke from Emlet and in the income and proceeds thereof, the appointment of a receiver and the liquidation of the enterprise and the distribution of its assets.

The District Court found that Cooke was a member of the joint enterprise, that Gay was a confidential employee of the enterprise, that Emlet had been coerced into transferring enterprise property to Cooke and that petitioners were entitled to a judicial accounting of the proceeds and profits of the property thus acquired. A receiver was appointed to take charge of the property and a Special Master was appointed to hear and determine the claims of the members of the enterprise. The Master after hearing the claims of 517 persons submitted his report to the District Court. The District Court disagreed with the Master as to the amount for which Cooke and Gay were liable, holding that the profitable oil developments which the Master had found to be profits of the enterprise were the result of Cooke's individual efforts for which he was not accountable to petitioners, and that the extent of Cooke's liability was the amount which in the opinion of the District Court was a fair and reasonable consideration for the property which he had acquired from Emlet.

The District Court assessed the costs of the proceedings in that Court against respondents on the following grounds:

"The mistake made by Cooke was in not forcing the issue through receivership and liquidation, instead of coercing Emlet. In that way, he could have, in competition with his co-investors and the public, purchased all or part of the assets. However, the course followed did not give to the matter any 'untouchable' aspect, or convert what was otherwise dross under any normal conception into gold. It simply imposed upon Cooke the duty of accounting to his associates for what he took and prohibited him from reaping any unjust profit therefrom" (R. 349).

* * * * *

* * * "In view of the circumstances, however, and especially the failure of Cooke to resort to judicial procedure for the settlement of his relations with Emlet and the other investors, instead of adopting the method which he used, I think the costs of this proceeding should be borne by the estate drawn into the hands of the receiver" (R. 353).

The court below affirmed the judgment of the District Court on the merits, but as to the imposition of costs reversed the District Court with directions to tax costs against petitioners.

The petition for writ of certiorari filed in this Court on September 5, 1942, assigned four grounds for granting the writ. They were: (1) the court below so far departed from the proper course of judicial proceedings as to call for the exercise of this Court's power of supervision; (2) the decision of the District Court, which was not reversed by the court below, is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit; (3) the decision of the court below is in conflict with the decisions of the Supreme Court of Louisiana on an important question of local law; (4) the court below decided an important question of substantive law in conflict with the weight of authority.

In this petition for rehearing it is not proposed to reargue the aforementioned reasons for granting the writ. The purpose of this petition is to set forth reasons why this

Court in the exercise of a sound discretion should vacate its Order of October 19, 1942, and reconsider the original petition on its merits.

REASONS FOR GRANTING REHEARING.

1. The judgment of the court below results in a serious miscarriage of justice. The principal error committed by the court below was that of deciding the case upon an assumed set of facts which were directly at variance with the facts established at the trial of the case and found to exist by the Master and the District Court. The court below ascribed to the District Court findings of fact which were the opposite to those which the District Court actually found. It literally misquoted the District Court in stating the facts upon which it rendered judgment. Set forth below in parallel columns are the findings ascribed by the court below to the District Court (Judge Dawkins) and the actual findings by the District Court:

**What The Court Below
Stated the District
Court Found:**

“. . . there never was at any time, any agreement or understanding of any kind that Cooke or Gay or either of them, were or would be joint adventurers with plaintiffs.” (R. 1546).

“. . . Cooke was no part of his (Emlet's) regular group but recognized by Emlet and them, as outside of it, . . .” (R. 1541).

**What The District Court
Found:**

“Since Cooke was aware of the situation, having gone into the enterprise on the same terms himself, . . .” (R. 227, 343).

Petitioners were Cooke's “co-investors” (R. 349).

(Cooke) “Starting out, as did the others in the beginning, with a small investment, the salesmanship or enthusiasm of Emlet induced Cooke to come in and keep increasing his investment . . .” (R. 349).

If there were any doubt as to the findings and conclusions of the District Court on this point, the interlocutory decree which was rendered by the District Court would resolve all such doubt. This decree adjudged and declared that the exploratory operations theretofore conducted by Emlet, Cooke, and Gay, or either of them, "is hereby declared a joint venture and enterprise for the mutual benefit and profit of the several members thereof", and charged with a lien and trust "for the common benefit of the complainants and respondents and all other persons interested therein as contributing members" (R. 230). In its final opinion the District Court reiterated that it had found that a "joint adventure" existed (R. 342).

In petitioners' application for writ of certiorari it is pointed out wherein the court below in addition to misquoting findings of the District Court, also misstated petitioners' contentions in the court below and misstated the theory on which the Master had found for petitioners. The court below decided the case on the theory that petitioners were asserting that the assignment of enterprise property from Emlet to Cooke made Cooke a member of the joint enterprise. Petitioners never made such an assertion and it is difficult to comprehend how the court below could have ascribed such a contention to petitioners in view of the argument consistently made by petitioners that the basis of Cooke's membership in the joint enterprise was the same as petitioners; namely, the membership contracts to which Cooke as well as petitioners were parties. The decision of the court below based upon the improper, incorrect and unsupported theory that the District Court had found that Cooke was not a member of the enterprise, hence owed no fiduciary obligations to his co-investors, perverted the decisive issues in this case. The District Court had held that Cooke *was* a member of the joint enterprise and *was* accountable to his co-investors for the profits and proceeds of the property which he had obtained by coercion from the managing trustee. The issue which the court below should have decided was whether the District Court properly held that Cooke was not accountable for the profits

which he received from his subsequent oil developments because the consideration which Cooke had paid Emlet for the enterprise property was in the opinion of the District Court fair and reasonable under the circumstances existing at the time of the transfer.

We do not propose to argue in this petition the unsoundness of views expressed by the District Court. We do urge that the refusal of the court below to decide the real question before it on the assumption that it was not involved in the case, was a flagrant departure from proper judicial procedure which this Court should not tolerate. The petitioners did not receive justice in the court below because that court, instead of deciding the decisive issues involved in the proceeding, disposed of the case on an assumed set of facts which evaded the decisive issues. We respectfully submit that this Court should not permit such a departure from proper judicial proceedings and that the decision of the court below when viewed in the setting of the record before that court calls for the exercise of this Court's power of supervision to correct a patent miscarriage of justice.

2. The judgment of the court below unjustly imposes upon petitioners the obligation of paying some twenty-six thousand dollars for the costs of the proceedings in the District Court. The District Court held that respondents had violated their trust obligations and that petitioners were entitled to a judicial accounting from them. The court below under its distorted view of the facts as to the existence of the joint enterprise and the resulting right of petitioners to an accounting, held that the suit had been brought upon an unfounded claim and therefore the costs of the proceedings should be assessed against petitioners. Subsequent to the entry of the judgment of the court below, the District Court entered an order taxing jointly and in solido against all the petitioners and all the claimants who appeared and filed a claim with the Master, except Cooke and Gay who also filed claims, all the costs of the suit, of the receivership, and of the accounting had between the enterprise and the respondents, aggregating all told the sum of \$26,578.35, and ordered execution therefor. At the present time there-

fore, petitioners are under an obligation to pay \$26,578.35 for an accounting to which they were entitled as a matter of law.

In view of the substantial hardships inflicted upon petitioners as a result of the erroneous decision of the court below, it is respectfully submitted that this Court should not permit the decision of that court to go unreviewed. Although the personal hardship which results from a decision of a circuit court of appeals affords no basis, in and of itself, for granting a writ of certiorari to review such decision, it is respectfully submitted that when such hardship is inflicted by an erroneous decision which demonstrates on its face that the court below did not give that careful consideration to the case before it which litigants are entitled to expect in our circuit courts of appeal, this Court is justified, in the exercise of a sound discretion, in giving its attention a second time to the reasons assigned for granting a writ. It is respectfully submitted that the petition for writ of certiorari filed in this Court on September 5, 1942, sets forth several grounds, any one of which is adequate under the Court's rules and applicable decisions for granting the writ.

PRAYER.

In view of the foregoing it is respectfully prayed that the Court vacate its Order of October 19, 1942, and grant the petition for writ of certiorari filed September 5, 1942.

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CERTIFICATE OF COUNSEL.

I, William J. Dempsey, attorney for petitioners herein, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

WILLIAM J. DEMPSEY.

